86-31

Supreme Court, U.S.
FILED
JUL 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

JASPER J. TATE,

Petitioner

VS.

OVERSEAS BULKTANK CORPORATION

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITIONER

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Jasper J. Tate, the Petitioner herein, who is a merchant seaman suing pursuant to 28 USCA 1916 and Rule 47-2 of this Court, prays that a Writ of Certiorari issue to review the judgment

of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on March 20, 1986.

QUESTION PRESENTED FOR REVIEW

By affirming the Summary Judgment of the U. S. District Court that didn't even adjudicate Petitioner's claim for maintenance, the U. S. Court of Appeals for the Fifth Circuit has abolished a seaman's right to maintenance granted him under general maritime law, which is contrary to Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938) and Vaughn v. Atkinson, 369 U.S. 527 (1962) that grant maintenance and maintenance remedies to a seaman, to Petitioner's prejudice.

LIST OF PARTIES TO PROCEEDINGS

The caption contains the names of all parties to this proceeding.

BEST AVAIL

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Calmar S.S. Corp. v. Taylor,
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(1983) 2, 10, 11

Vaughn v. Atkinson,
369 U.S. 527; 82 S.Ct. 997
(1962) 2, 7, 10, 11

Vella v. Ford Motor Corp.,
421 U.S. 1, 95 S.Ct. 1381
(1975)..... 11

REFERENCE TO OPINIONS

The United States Court of Appeals for the Fifth Circuit without opinion affirmed the Summary Judgment of the U. S. District Court for the Eastern District of Texas on March 20, 1986, and is printed in Appendix, infra, page 27. The Summary Judgment of such U. S. District Court was entered on October 3, 1985, and is printed in Appendix, infra, page 13. The Memorandum Opinion of the U. S. District Court entered October 3, 1985, is printed in Appendix, infra, page 15.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit (Appendix, infra, page 27) was entered on March 20, 1986. A timely Petition for Rehearing was denied on April 17, 1986 (Appendix, infra, page 29). The jurisdiction of the United States Supreme Court is invoked under Rule 17,(1),(c) of the Supreme Court Rules since such Court of Appeals has decided a Federal question that conflicts with applicable decisions of this Court.

STATUTE INVOLVED

Case involves no constitutional provision, treaties, statutes, ordinances and regulations--just general maritime law and decisions of this Court.

STATEMENT OF CASE

Petitioner, a merchant seaman, suffered a psychological injury while employed by Overseas Bulktank Corporation as a merchant seaman aboard the SS OVERSEAS ARCTIC and his Complaint included a claim for maintenance and a claim for the remedies provided by Vaughn v. Atkinson, 369 U.S. 527, 82 S.Ct. 997 (1962) because of the non-payment of maintenance to him.

Such Complaint was filed in the United States District Court for the Eastern District of Texas and the basis for Federal jurisdiction in that Court was under the general maritime law and under the Jones Act, 46 USC, Sec. 688.

Overseas Bulktank Corporation filed a Motion for Partial Summary Judgment on all claims of Petitioner

except his claim for maintenance and the failure to pay same.

Although not before the U. S. District Court for summary adjudication, that Court, instead of granting a Partial Summary Judgment, granted Summary Judgment upon the whole case.

The Petitioner timely appealed from such Summary Judgment to the United States Court of Appeals for the Fifth Circuit which on March 20, 1986, without opinion, affirmed the Summary Judgment in its entirety. On April 17, 1986, such Appellant Court overruled and denied Petitioner's Petition for Rehearing.

Thus, Petitioner finds himself to be a victim of having his legal rights to maintenance and remedies for failure to pay same, deprived him without due

process of law, such as Jury trial or at least a Court hearing where such claims are properly presented to the Court for adjudication.

REASONS FOR GRANTING WRIT

By the simple expediency of impermissible adjudication of Petitioner's action for maintenance and related remedies which were not before the District Court for adjudication in the first place, Petitioner has been deprived of valuable legal rights granted him by general maritime law.

If not corrected, the United States Court of Appeals for the Fifth Circuit will be setting a precedent that a District Court can make an ex parte determination of issues that are not even raised by a Motion for Summary Judgment. The extent to which a

District Court has authority to grant Summary Judgment is dependent upon the Motion for Summary Judgment which invokes the Summary Judgment power of the Court and establishes the perimeter of the Summary Judgment. The District Court is not authorized to grant a Summary Judgment beyond the confines of the Motion for Summary Judgment. That is true because, otherwise, it would be absolutely impossible for the non-moving party to know what to respond to.

The law of the United States Supreme Court is clear that a merchant seaman, such as Petitioner, has an action for maintenance under general maritime law. Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 58 S.Ct. 651 (1938); Vaughn v. Atkinson, 369 U.S. 527, 82 S.Ct. 997 (1962); and

Vella v. Ford Motor Co., 421 U.S. 1, 95 S.Ct. 1381 (1975).

The law of this Court is equally clear that a merchant seaman has the remedy sanctioned in Vaughn v. Atkinson, 369 U.S. 527, 82 S.Ct. 997 (1962) because of the default or failure of his employer to pay him maintenance.

The action of the United States Court of Appeals for the Fifth Circuit on March 20, 1986, affirming the Judgment of the District Court is in direct conflict with applicable decisions of this Court which are Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 58 S.Ct. 651 (1938); Vaughn v. Atkinson, 369 U.S. 527, 82 S.Ct. 997 (1962); and Vella v. Ford Motor Co., 421 U.S. 1, 95 S.Ct. 1381 (1975).

APPENDIX

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Order of the U. S. District Court for the Eastern District of Texas granting Summary Judgment on 10-3-86..... 13

Memorandum Opinion of the U. S. District Court for the Eastern District of Texas dated 10-3-85..... 15

Order of the U. S. Court of Appeals for the 5th Circuit affirming Judgment of the U. S. District Court dated 3-20-86 27

Order of the U. S. Court of Appeals for the 5th Circuit Denying Petitioner's Petition for Rehearing dated 4-17-86 29

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF TEXAS, BEAUMONT DIVISION

JASPER J. TATE	X	
VS.	X	CIVIL ACTION NO. B-84-594-CA
OVERSEAS BULK-TANK CORPORATION	X	

ORDER GRANTING SUMMARY JUDGMENT
IN FAVOR OF OVERSEAS BULKTANK
CORPORATION

CAME ON THIS DAY for consideration the Defendant OVERSEAS BULKTANK CORPORATION'S Motion for Summary Judgment, and the Court, having considered same and the matters submitted in support thereof as well as in opposition thereof, is of the opinion that said Motion is meritorious and should be in all things GRANTED;

It is therefore, ORDERED, ADJUDGED and DECREED by the Court that Defendant OVERSEAS BULKTANK CORPORATION'S Motion for Summary Judgment be, and the same is hereby GRANTED, and judgment in favor

of OVERSEAS BULKTANK CORPORATION, as to Plaintiff's cause of action asserted against OVERSEAS BULKTANK CORPORATION herein, is hereby awarded, with all costs assessed against the party incurring same.

SIGNED AND ENTERED this 3rd day of October, 1985.

/s/ Howell Cobb
UNITED STATES DISTRICT
JUDGE PRESIDING

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF TEXAS, BEAUMONT DIVISION

JASPER J. TATE	X	
VS.	X	CIVIL ACTION NO. B-84-594-CA
OVERSEAS BULK-TANK CORPORATION	X	

MEMORANDUM OPINION

This action was commenced by Jasper J. Tate. In his original complaint filed on June 20, 1984, plaintiff alleged that he was wrongfully discharged from the Overseas Bulktank Corporation's vessel the S/S OVERSEAS ARCTIC, a tanker which carried crude oil. Plaintiff further alleged in his original complaint that because of his "wrongful discharge" he suffered emotional distress, was entitled to maintenance and cure and punitive damages.

This action is now before this Court on defendant's motion for summary judgment.

FACTS

The Particulars of Engagement show that the plaintiff became an employee of the defendant for duty on the S/S OVERSEAS ARCTIC on March 31, 1984, as an oiler/maintenance/utility man. This employer-employee relationship continued until June 4, 1984. On June 4, 1984, the plaintiff was given what is best described as a letter entitled "Dismissal for Cause" signed by the 3rd, 2nd, and Chief engineers of the S/S OVERSEAS ARCTIC. It is also noted that the plaintiff had oral notice of his discharge prior to receiving the dismissal for cause letter on June 4, 1985.

The tanker S/S OVERSEAS ARCTIC is equipped with two distinct systems. One is an inert gas system which reduces the oxygen content in the cargo

areas of a ship by circulating the ship's carbon monoxide into the cargo areas. The purpose of this system is to reduce the possibility of explosion of flammable fumes which remain in the cargo tanks after oil is discharged from an oil tanker. The other system expels carbon and soot build-up by utilizing blown steam. The process of removing the carbon is referred to as blowing the ship's tubes. It is important that the inert gas system and the steam procedure are not in operation at the same time, since steam carries a positive charge which increases the risk of explosion.

After leaving port May 26, 1984, the S/S OVERSEAS ARCTIC engaged its inert gas system. Later, with the inert gas system still engaged, the plaintiff informed a fellow-employee, an oiler,

to "put the steam on." Putting the steam on refers to the first step in the "blowing the tubes" process. It is necessary for the blowers to be turned on before the tubes can be blown. Thus there remained only one step to be taken to engage the inert gas system and it was the job of the plaintiff to inform the oiler that the inert gas system was engaged. At this point, the second assistant reprimanded the plaintiff, and then conferred with the chief engineer. An argument between all three then ensued and the plaintiff was ordered to leave the engine room.

The plaintiff in his deposition related the events in the following manner:

Q. What did the second assistant say?

A. That's what he said, what I

just said: 'What's the matter with you, you stupid bastard? Don't you see that I.G. system is on?'

Q. What was your response?

A. I said, "Yes, I know it's on." I knew then it was a mistake. I should have held the oiler back, but I didn't think about it and my engineer didn't think about it. We don't blow the tubes.

The S/S OVERSEAS ARCTIC Particulars of Discharge show that the plaintiff left the employ of the defendant June 4, 1984, at the port where he first joined the ship. The plaintiff then instituted this action.

It is the opinion of this court that the defendant's motion for summary judgment should be granted and the plaintiff's complaint dismissed, for the following reasons: (1) the plaintiff's employment contract provided for termination at will; (2) any state law claims have been pre-empted by the

collective bargain agreement.

I. PLAINTIFF'S EMPLOYMENT CONTRACT PROVIDED FOR TERMINATION AT WILL

The Shipping Articles of the S/S OVERSEAS ARCTIC provide, in part:

> Either party may terminate this agreement for himself by giving to the other at least 24 hours notice prior to arrival of vessel at any United States Port exclusive of Alaska or Hawaii. It is also agreed that the provisions of the respective collective bargaining agreements shall be incorporated as part of the Shipping Articles described above.

The Collective Bargaining agreement provides in Sec. 4 of Article I the following:

> The union agrees that the company has the right to reject... or to discharge any member of the unlicensed personnel who, in the opinion of the company is not satisfactory. If the union considers...the discharge of any member of the unlicensed personnel as being without reasonable cause such action by the company shall be dealt with under the grievance procedure.

Thus, by contract the plaintiff was an employee subject to discharge at will by his employer on 24 hours' notice. In Smith v. Atlas Off-Shore Boat Service, Inc., 653 F.2d 1057 (5th Cir. 1981), the Court of Appeals for this Circuit held that "The maritime employer may discharge a seaman for good cause, for no cause, or even, in most circumstances, for morally reprehensible cause." at p. 1063. In Smith the Court did recognize a cause of action for wrongful discharge and damages for mental anguish. However, the Court also noted:

> The cause of action we recognize is limited. It subjects the employer to liability for compensatory damages if, and only if, the seaman can establish that a substantial motivating factor in the employer's decision to discharge him was the seaman's personal injury action arising out of the employment relation. It does not prevent the employer from discharging the seaman

> for any or no reason, unless that reason is the seaman's filing of a personal injury claim. (Emphasis added)

The plaintiff sustained no personal injury, and his suit was based on his wrongful or "negligent" breach of contract.

The Texas Supreme Court has also recognized a similar narrow exception. In Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985), it was held that an exception exists for an employee who is discharged for the sole reason that the employee refused to perform an illegal act.

After a careful reading of both the Smith and Sabine opinions, this Court concludes that the rationale behind both opinions is to prohibit employers from exerting economic pressure on their employees to perform acts contrary to public policy. No facts

have been presented or pleaded in the case at bar concerning employer over-reaching, nor did the plaintiff in his deposition reveal any such facts.

Thus, pursuant to Smith and the contractual provisions cited above, there exists no cause of action for the plaintiff to assert in regard to negligent discharging of a seaman based on general maritime law.[1] It is also important to note the plaintiff did not pursue any grievance procedure provided for by the collective bargaining agreement.

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[1] The Court in Smith treated the wrongful discharge cause of action as an intentional tort arising under general maritime law and not under the Jones Act.

II. STATE LAW CLAIMS ARE PRE-EMPTED BY THE COLLECTIVE BARGAINING AGREEMENT.

The plaintiff also alleges that the defendant tortiously interfered with the collective bargaining agreement and general business relations between the plaintiff's union and the defendant. For this proposition, the plaintiff cites Gonzales v. Guiterrez, (Tex. App.-San Antonio, 04-83-00414, 9-17-85). Shortly before the hearing on the motion for summary judgment, the plaintiff asked this court for leave to file an amended complaint stating a cause of action for libel.

In Strachan v. Union Oil Company, 768 F.2d 703 (5th Cir. 1985), the Court of Appeals for this Circuit stated:

> The law is completely clear that employees may not resort to state tort or contract claims in substitution for their rights under the

> grievance procedure in a collective bargaining agreement.

At p. 704, the Court continued:

> Even defammation claims under state law have been pre-empted by the grievance-arbitration procedure unless malice is shown.

At p. 706. Citing Linn v. United Plant Guard Workers, 383 U.S. 33, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966). No malice has been alleged by the plaintiff in this case. This Court holds this principle pre-empts all claims made by the plaintiff under state law because the plaintiff has not pursued his rights given him under the collective bargaining agreement between his union and his employer. Furthermore, this court denies plaintiff's request to amend his original complaint, as to do otherwise would be pointless in

light of the holding in Strachan.

This court is of the opinion that the plaintiff's complaint should be dismissed and the defendant's motion for summary judgment should be granted. It is so ORDERED.

SIGNED and ENTERED this 3rd day of October, 1985.

/s/ Howell Cobb
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

No. 85-2759
Summary Calendar

JASPER J. TATE,

Plaintiff-Appellant

versus

OVERSEAS BULK-
TANK CORPORATION,

Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Texas

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(March 20, 1986)

Before GEE, RANDALL, and DAVIS, Circuit Judges.

PER CURIAM: *

On the basis of the district court's Memorandum Opinion, its judgment is AFFIRMED.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

IN THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

No. 85-2759

JASPER J. TATE,

Plaintiff-Appellant

versus

OVERSEAS BULK-
TANK CORPORATION,

Defendant-Appellee

Appeal from the United States
Court for the Eastern
District of Texas

ON PETITION FOR REHEARING

(April 17, 1986)

Before GEE, RANDALL and DAVIS,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition

for rehearing filed in the above

entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Thomas G. Gee
United States Circuit Judge

BILLY JOE SANDERS,
COUNSEL OF RECORD OF
PETITIONER

SANDERS & SANDERS
920 San Jacinto Building
Beaumont, Texas 77701
Phone: 409-838-6377

CERTIFICATE OF SERVICE

This is to certify that a copy of the Entry of Appearance, together with three copies of Petitioner's Petition for Writ of Certiorari, have been served upon Mr. Alan G. Sampson, attorney for Overseas Bulktank Corporation, on this the _____ day of July, 1986, by depositing same in the United States mail with first class postage pre-paid addressed to Mr. Alan G. Sampson, P. O. Drawer 150, Beaumont, Texas 77704.

BILLY JOE SANDERS,
COUNSEL OF RECORD OF
PETITIONER